

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH FUSCO,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

(CSA 1 728 025)

DOCKET NUMBER
PH831M8610647

DATE:

DEC 08 1988

Joseph Fusco, Brandywine, Maryland, pro se.

Raymond J. Kirk, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

Vice Chairman Johnson issues a concurring opinion.

OPINION AND ORDER

The appellant petitioned for review of the initial decision issued on October 24, 1986, that sustained the reconsideration decision in which the Office of Personnel Management (OPM) found that the appellant had been overpaid \$980.00 in civil service retirement benefits and denied his request for a waiver. On April 15, 1988, the initial decision became the final decision of the Board because there was no majority to alter it. On April 28, 1988, however, the Vice Chairman reopened the initial decision pending appointment of a third Board member.

In accordance with that order, the Board will now consider the appellant's entitlement to waiver of an annuity overpayment. For the reasons set forth below, the Board VACATES the initial decision and REMANDS the case for further adjudication.

BACKGROUND

The appellant was overpaid \$980.00 as a result of OPM's failure to timely recompute his civil service retirement annuity by eliminating credit for post-1956 military service when he became eligible to receive social security benefits. See 5 U.S.C. § 8332(j). The existence and the amount of the overpayment are not in dispute. It is also conceded that the appellant was not at fault in causing the overpayment. This case then presents the question whether recovery of the overpayment would be against equity and good conscience. See 5 C.F.R. § 831.1401.

The appellant requested OPM to waive collection of the overpayment, claiming that recovery would cause him financial hardship. He submitted a Financial Resources Questionnaire (FRQ) to OPM, specifying his monthly income and expenses and his total assets and liabilities. OPM disallowed the appellant's claim of \$210.00 in expenses for charitable contributions, and determined that they were not normal and necessary to sustain life. Having determined that the appellant's monthly income exceeded expenses by \$300.00, OPM concluded that the appellant was financially

able to repay the overpayment at \$140.00 a month for 7 months.

On appeal to the Board, the appellant submitted an updated FRQ, in which most expenses were unchanged from the earlier submitted FRQ. The administrative judge noted, however, that there were several monthly expenses that appeared on the latest FRQ but were not included on the questionnaire submitted to OPM. Those expenses included \$12.00 for dry cleaning and laundry, \$26.00 for recreation, \$20.00 for vacations, and \$128.00 for dining out.

The administrative judge found that the dry cleaning and laundry expense was reasonable and necessary, but that the expenses for recreation, vacation, and dining out could be considered luxury items and were not "ordinary and necessary living expenses" within the scope of 5 C.F.R. § 831.1405.¹ Finding that the appellant's monthly income exceeded his expenses of \$140.00 and that the appellant had \$2,700.00 in liquid assets, the administrative judge concluded that, although the appellant needed most of his current income to meet expenses, he did not establish that collection of the overpayment at \$140.00 a month for 7 months would cause him financial hardship.

The appellant petitioned for review, challenging the administrative judge's finding that he did not show that he was entitled to a waiver based on financial hardship. In particular, he questioned the administrative judge's finding

¹The text of this regulation may be found at 8, *infra*.

that recreation, vacation, and dining out expenses were luxury items that could not be regarded as "ordinary and necessary living expenses."

On July 30, 1987, the Board notified the parties that, pursuant to 5 C.F.R. § 1201.67, it was taking official notice of a document published in March 1987 by the Compensation Group of OPM entitled *Policy Guidelines on the Disposition of Civil Service Retirement Overpayments (Policy Guidelines)*. See Petition For Review File, Tab 3 (Order dated July 30, 1987). The Board ordered OPM to provide a copy of the *Policy Guidelines* to the appellant within 14 days.² The Board ordered the parties to brief the applicability of the *Policy Guidelines* to this case and informed them that they could submit objections to the Board's taking official notice of the *Policy Guidelines*.

On August 10, 1987, OPM served a copy of the *Policy Guidelines* on the appellant. The appellant has submitted a response, identifying provisions of the *Policy Guidelines* that he believes are applicable to his case; he has not objected to the Board's taking official notice of the *Policy Guidelines*. Nor has OPM filed an objection.

²The Board's order was sent to the appellants and their representatives in approximately fifty pending cases involving various overpayment issues. In each case, OPM was ordered to send a copy of the *Policy Guidelines* to the appellant and his/her representative, if applicable.

ANALYSIS

Recovery of an annuity "may not be made from an individual when, in the judgment of the Office of Personnel Management, the individual is without fault and recovery would be against equity and good conscience." 5 U.S.C. § 8346(b). The appellant has the burden of proof and must prove by substantial evidence that he is entitled to a waiver. 5 C.F.R. § 831.1407(b). Recovery is against equity and good conscience when, among other circumstances,³ it would cause financial hardship to the person from whom it is sought. 5 C.F.R. § 831.1403.

1. Determining Whether Recovery Would Cause Financial Hardship

Financial hardship may be deemed to exist in—but is not limited to—those situations where the appellant needs substantially all of his current income and liquid assets to meet current ordinary and necessary living expenses and liabilities. 5 C.F.R. § 831.1404. Although OPM's regulations provide a general framework for evaluating an appellant's assertion that recovery would cause financial hardship, they do not define "financial hardship." The *Policy Guidelines* provide greater insight into the determination of financial hardship and, in the absence of a

³There are two other bases on which recovery of an overpayment may be found to be against equity and good conscience. 5 C.F.R. § 831.1403. Those bases are not at issue in this case.

detailed regulation, the Board will apply those guidelines when appropriate.

a. Consideration of Assets

The emphasis in § 831.1404 is on the individual's current ability to repay the overpayment, not on the individual's net worth. This is evidenced by the references to "current income," "liquid assets," "current ordinary and necessary living expenses and liabilities," and "financial ability to pay at the time collection is scheduled to be made." 5 C.F.R. § 831.1404. We interpret this regulation to mean that nonliquid assets generally should not be considered as available for recovery of an overpayment. The *Policy Guidelines* are consistent with this interpretation.⁴ See *Policy Guidelines* § I.D.5. at 7. Although the *Policy Guidelines* do not define "nonliquid assets," they define a "liquid asset" as cash or an asset that is readily convertible into cash with little or no loss of value. *Id.*⁵

⁴The *Policy Guidelines* do provide, however, that nonliquid assets should be considered if they are so substantial that ignoring them offends the conscience. See *Policy Guidelines* § I.D.5. at 7. They further provide that, if the appellant converts liquid assets to nonliquid assets after receiving notice that an overpayment was made in order to avoid recovery of the debt, those nonliquid assets must be considered. *Id.*

⁵The *Policy Guidelines* do, however, identify some examples of liquid and nonliquid assets for waiver purposes. Liquid assets include cash on hand, checking accounts, savings accounts, certificates of deposit, mutual funds, and marketable securities (e.g., stocks and bonds), whereas nonliquid assets include individual retirement accounts and other similar retirement savings accounts. *Policy Guidelines* §§ I.D.5. and 6. at 7. We agree and therefore accept these examples as illustrative of liquid and nonliquid assets.

The *Policy Guidelines* also recognize that, because liquid assets constitute an emergency fund for most people, not all liquid assets should be treated as available for recovery of the debt. See *Policy Guidelines* § I.D.6. at 7. They provide that, while the amount of liquid assets that should not be considered will depend on the individual's overall financial status, \$5,000.00, as a general rule, should be considered as unavailable for recovery. *Id.* § I.D.8. at 8. We agree that not all liquid assets should be treated as available for debt recovery, and we find that setting aside \$5,000.00, as a general rule is reasonable and practical.

b. Determination of Income/Expense Margin

In analyzing a claim of financial hardship, we must compare monthly income and monthly expenses throughout the period during which collection is scheduled to be made. The Board has found that in making this comparison, it is proper for an administrative judge to consider changes in an annuitant's expenses and income that are anticipated to occur during the projected period of collection. See *Eaton v. Office of Personnel Management*, 38 M.S.P.R. 216, 217-18 (1988). The Board has also found that an administrative judge should request additional information on anticipated expenses whenever the information submitted by the appellant is confusing or incomplete. See *Clinton v. Office of Personnel Management*, 38 M.S.P.R. 221, 223-24 (1988).

Monthly income is the annuitant's monthly income from all sources as stated on the FICQ, including income received by any other family member for whom the annuitant claims ordinary and necessary living expenses. See 5 C.F.R. § 831.1404(a)(2).

Determining "ordinary and necessary living expenses" is more difficult. According to 5 C.F.R. § 831.1405, "ordinary and necessary living expenses" include:

rent, mortgage payments, utilities, maintenance, food, clothing, insurance (life, health, and accident), taxes, installment payments, medical expenses, support expenses when the annuitant is legally responsible, and other miscellaneous expenses which the individual can establish as being ordinary and necessary.

We agree that the types of expenses specifically enumerated in the regulation are ordinary and necessary. We emphasize, however, that an annuitant must still show by substantial evidence that the amount claimed for the enumerated ordinary and necessary living expenses meets the reasonableness standard set forth below.

In addition to the enumerated types of expenses, the regulation provides for miscellaneous expenses that the individual can establish as being ordinary and necessary. According to OPM's *Policy Guidelines* § I.D.7. at 7, the standard for determining whether a miscellaneous expense is ordinary and necessary is one of reasonableness, i.e., whether a reasonable person would accept the expenses as

being ordinary and necessary. The *Policy Guidelines* further provide that, in general, the annuitant should be given the benefit of the doubt with respect to this matter unless the expense clearly constitutes an extravagance or a luxury. *Id.*⁶ OPM does not specify further what may be regarded as miscellaneous expenses and what constitutes reasonable amounts for those expenses.⁷

We find it appropriate to apply OPM's general guidelines concerning miscellaneous expenses. We adopt the reasonable person test for determining whether the type and amount of a miscellaneous expense is ordinary and necessary for a legitimate purpose and whether the amount of an enumerated expense is ordinary and necessary. Thus, we find that to meet the reasonable person standard the individual must show by substantial evidence that the amount of the enumerated expenses, and the type and amount of the miscellaneous expenses that he or she claimed are comparable

⁶In the instant case, however, OPM disallowed the appellant's claimed expenses for contributions because they were "not normal and necessary to sustain life." See *Petition For Appeal File*, Tab 3, *Reconsideration Decision* dated July 21, 1986. This is not, as shown above, the standard for disallowing expenses set out in 5 C.F.R. § 831.1405 or the *Policy Guidelines*.

⁷We note that the section on ordinary and necessary living expenses in the 1987 *Policy Guidelines* issued by OPM differs from that in the 1985 *Policy Guidelines* in two respects: The 1987 version omits the "benefit of the doubt" provision and specifies to a greater extent what OPM believes are not ordinary and necessary expenses. We will not consider the validity of the 1987 *Policy Guidelines*, however, because they are not now before us.

to what a person of ordinary prudence would require under similar circumstances.

We note that whatever the annuitant's "accustomed standard of living," we will apply a reasonable person test to both the amount and nature of the expenses claimed. In doing so, however, we recognize that the discrete circumstances particular to individual situations must be taken into account. See *Ballentine's Law Dictionary* 1060 (3rd ed. 1969) (Reasonableness is an elastic term; its determination depends upon a variety of considerations and circumstances).⁸

The appellant's monthly expenses are therefore calculated by adding the following figures: (1) The appellant's proven ordinary and necessary monthly expenses, including his or her miscellaneous expenses; and 2) \$50.00 for emergency expenses, as allowed by OPM, see *Policy Guidelines* § I.D.9. at 8. This total monthly expense figure is then subtracted from the appellant's total monthly income to ascertain the appellant's income/expense margin.

⁸*Cf. Coker v. Harris*, 508 F. Supp. 996, 997, 999 (M.D. Ga. 1981) (court held that Secretary of Health and Human Services erred in not allowing miscellaneous expenses for burial as ordinary and necessary living expenses under 20 C.F.R. § 404.508(a), which provides for "miscellaneous expenses which may reasonably be considered as part of the individual's standard of living," in determining whether overpayment should be waived under Title XVI of the Social Security Act).

c. Consideration of the Appellant's Total Financial Condition

Once the appellant's income/expense margin is determined, the Board will consider the appellant's total financial condition to determine if recovery would cause financial hardship.⁹ In determining financial hardship, the Board will consider whether, under 5 C.F.R. § 831.1404, the appellant needs substantially all of his current income and liquid assets to meet current ordinary and necessary living expenses and liabilities.

2. Application to the Instant Case

Applying the foregoing analysis in the instant case, we find that the administrative judge should consider the appellant's claimed expenses under the reasonable person test after allowing the parties the opportunity to submit relevant evidence. The administrative judge should consider the updated FRQ that the appellant submitted with his response to the Policy Guidelines;¹⁰ that FRQ provides for estimated roof repairs as an anticipated expense. See Petition For Review File, Tab 6. To substantiate anticipated changes in expenses or income during the

⁹See text at 5-6, *supra*, for a description of relevant considerations.

¹⁰The administrative judge should allow the appellant to submit an updated FRQ and supporting documentation if circumstances have changed substantially since the last FRQ was prepared or if expenses have been challenged by OPM. See *Derrico v. Office of Personnel Management*, MSPB Docket No. DC831M8610440, slip op. at 8-9 (December 8, 1989). The appellant should be asked to provide a reasoned explanation for any changes in items or amounts claimed from his earlier FRQs.

recovery period, the appellant should submit an affidavit and/or other evidence, e.g., a written repair estimate, to support the nature of the change, the extent of the change, and any other relevant factors.

We note also that, in an FRQ dated May 18, 1986, the appellant listed \$57,000.00 in debts owed to him by two individuals who share his surname. Because, under *Eaton*, anticipated changes in income during the projected period of recovery may be considered when determining financial hardship, the administrative judge should inquire when these debts are due and allow the appellant to submit evidence clarifying the nature of those debts. See *Clinton*, 38 M.S.P.R. at 223-24.

The record indicates that the appellant may have more than the \$2,700.00 in liquid assets found by the administrative judge. In addition, the FRQ indicates that he has \$51,000.00 in "notes" held. On remand, the appellant should be required to clarify the nature of those assets. The administrative judge, in ruling on the case, must apply the \$5,000.00 exemption discussed above at 7.

We note that the administrative judge found that the appellant needed substantially all of his current income and liquid assets to meet his current ordinary and necessary expenses, but that he did not show that collection of the overpayment would cause him financial hardship. Absent extraordinary circumstances, if an appellant proves by substantial evidence that he needs substantially all of his


current income and liquid assets to meet his current expenses, he has established that recovery would cause him financial hardship and is therefore entitled to a waiver.

On remand, the administrative judge should calculate the appellant's income/expense margin in accordance with the principles discussed in this Opinion and Order and then evaluate the appellant's total financial condition. The administrative judge may apply other relevant provisions of the *Policy Guidelines*, as appropriate.

ORDER

Accordingly, the case is REMANDED to the Board's Philadelphia Regional Office for further adjudication consistent with this Opinion and Order. On remand, the appellant should be afforded the opportunity to request a hearing.


FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF VICE CHAIRMAN MARIA L. JOHNSON

While I agree in general with the majority's explanation of the reasonable person test, I write separately to state my view that in applying this test one should consider, as one factor, the appellant's usual standard of living and how long he has maintained that standard of living, even if he increased or acquired that standard of living as a result of the overpayment.


Maria L. Johnson